IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

## No. 281

JAMES E. SWANN, ET AL.,

*Petitioners,*

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,

*Respondents.*

Certiorari to the United States Court of Appeals for the Fourth Circuit

## AMICUS CURIAE BRIEF OF THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA

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## NATURE OF INTEREST OF AMICUS CURIAE

This brief is filed on behalf of the School Board of the County of Hillsborough, a political subdivision of the State of Florida, and is sponsored by the attorney for the School Board of Hillsborough County, Florida, the authorized law officer thereof, under Rule 42(4) of the Rules of the Supreme Court of the United States.

The School Board of Hillsborough County's interest arises because, in *Mannings v. Board of Public Instruction of Hillsborough County, Florida,* 5 Cir. 1970, _____ F.2d _____ [No. 28,643, May 11, 1970], the Fifth Circuit, and in subsequent orders thereto entered by the District Judge of the United States District Court for

the Middle District of Florida, certain elementary schools were directed to be paired. Such orders entirely ignored the provisions of Title 42, Sections 2000c.(b) and 2000c.—6(a)(2), which provide that "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance, and prohibit any official or court of the United States from issuing any order seeking to achieve a racial balance in any school by requiring the transportation of pupils from one school to another in order to achieve such racial balance. Such orders also necessarily required the busing of students from parts of the school areas as paired, to the school building where the classes were to be held, a condition which did not previously exist prior to the entry of such orders. Florida law provides that no state funds shall be paid for the transportation of pupils whose homes are within two miles from the nearest appropriate school. Section 234.01, Florida Statutes. In a number of instances, the pairing of elementary schools directed as aforesaid results in requiring busing students from portions of the school areas directed to be paired, in excess of two miles to the school building where appropriate classes are held, thus requiring the busing of students not contemplated by the School Board.

## QUESTIONS PRESENTED

1. Does the Constitution require or permit the courts to order the busing of pupils solely to achieve racial balance?

2. Did the courts below improperly disregard the explicit direction of Congress in Section 407(a)(2) of the Civil Rights Act of 1964, that "nothing herein shall impower any * * * court of the United States to issue

ny order seeking to achieve racial balance in any school y requiring the transportation of pupils or students rom one school to another in order to achieve such acial balance."?

## ARGUMENT

No decision of this Court has required racial balanc-ng. Every decision from *Brown v. Board of Education,* , 347 U.S. 483, through *Alexander v. Board of Education,* 96 U.S. 19, has reiterated the Constitution's mandate or wholly non-racial public school systems.

A concise statement of the law appears in *Deal v. Cincinnati Board of Education,* U.S.C.A., 6 Cir. (1966) 69 F.2d 55 (Deal I), cert. denied 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed. 114, where it was said:

> "We hold that there is no constitutional duty on the part of the Board to *bus* Negro or white children out of their neighborhoods or to transfer classes *for the sole purpose of alleviating racial imbalance* that it did not cause, nor is there a like duty to select new school sites solely in futherance of such a purpose." (emphasis supplied)

A three-judge court in *Briggs v. Elliott,* 132 F.Supp. 776, firmly declared:

> "The Constitution, in other words, does not require integration. It merely forbids discrimination."

At least seven Circuit Courts of Appeal support this doctrine. Only the Fifth Circuit has discarded its earlier approval of the case and now adheres to the racially oriented policy of racial balancing, *U.S. v. Jefferson County Board of Education,* 372 F.2d 836, adhered to on rehearing, 380 F.2d 385.

The concept of racial balancing as a form of desegregation was explicitly and emphatically disapproved by Congress when it enacted the Civil Rights Act of 1964. When the bill was considered on the floor of the House on February 6, 1964, Mr. Cramer of Florida offered an amendment which provided that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." Chairman Celler of the Judiciary Committee accepted that amendment, and, as thus amended, Section 401(b) was not further changed in the course of the passage through Congress; it was carried on to the statute book as amended by Mr. Cramer.

Notwithstanding the provisos in Section 401(b) and 407(a) of the Civil Rights Act of 1964, they have been either consistently misread, or simply disregarded by the courts that have had these statutory directions called to their attention. *U.S. v. Jefferson County Board of Education, supra, Caddo Parish School Board v. U.S.*, 389 U.S. 840. This disregard of congressional action constitutes another reason for review by this Court. Nothing in the Constitution of the United States permits, much less requires, the busing of school children to achieve racial balancing. The direction (*Alexander v. Board of Education,* 396 U.S.19) "to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color" forbids the result obtained below, which in fact excludes several hundred white children from the walk-in schools nearest their homes simply because admitting them there fails to achieve racial balancing within the entire system. Past discrimination in one direction does not justify present discrimination in another.

## CONCLUSION

These issues which have caused wide-spread confusion must be resolved. The time is now. Amicus urgently requests the Court to announce that the busing of pupils solely to achieve racial balance should not be required; that the concept of the neighborhood school should be preserved, and that involuntary pairing of schools is educationally and economically unsound, threatening to encroach upon and destroy the historical concept of the American school system.

Respectfully submitted,

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